

55. The Consumers facility is an "onshore facility" within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

56. Consumers is an "owner or operator" within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2.

57. Baby Creek, the Detroit and Rouge Rivers are navigable waters of the United States as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1.

58. Consumers' facility is a facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shoreline.

59. Consumers' facility had above ground containers with a storage capacity of greater than 660 gallons of oil and a total above ground storage capacity of more than 1,320 gallons of oil.

60. Consumers gathered, stored, or consumed oil or oil products at the facility.

61. Consumers' facility is a non-transportation-related facility under the definition incorporated by reference at 40 C.F.R. § 112.2 and 40 C.F.R. Part 112, Appendix A.

62. The regulation at 40 C.F.R. § 112.3(b) requires an owner or operator of an onshore facility that became operational after the effective date to prepare an SPCC plan no later than six months after the date the facility started operations if the facility has violated or could reasonably

be expected to violate 40 C.F.R. Parts 110 and 112. Consumers has been in operation from at least January 1, 1983. Consumers had a storage capacity greater than 660 gallons for one tank at least since December 31, 1995.

63. From at least July 1, 1996 to June 30, 2000, Consumers did not have an SPCC plan. Consumers violated and continued to violate 40 C.F.R. § 112.3(b) and 311 of the CWA, 33 U.S.C. § 1321 during this time period by failing to prepare and have an SPCC plan for its facility.

IV. Proposed Civil Penalty

As presented in detail below the Complainant proposes a civil penalty of \$202,270 for the violations alleged in Counts I-III.

A. COUNTS I & II

64. Pursuant to Section 113(d) (1) (B) of the CAA, 42 U.S.C. § 7413(d) (1) (B), U.S. EPA may assess a civil penalty of up to \$27,500 per day for each violation of Section 608 of the Act and for violation of regulations promulgated pursuant to Section 608.

65. Section 113(e) (1) of the Act, 42 U.S.C. § 7413(e) (1), authorizes the assessment of a civil penalty based upon the seriousness and duration of the violation alleged, and after consideration of the size of the business, the economic impact of the penalty on the business, the Respondent's full compliance history and good faith efforts to comply, payment by Respondent of penalties previously assessed for the same alleged violation, the economic benefit of noncompliance, and other factors as justice may require.

66. After considering these factors, U.S. EPA proposes that the Respondent be assessed a civil penalty of \$187,000 for Counts I & II (\$93,500

for each count). This proposed penalty has been calculated in accordance with the Penalty Policy for Violations of 40 CFR Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant ("CAA Penalty Policy"), dated June 1, 1994. A copy of the CAA Penalty Policy accompanies this Complaint.

67. Under the CAA Penalty Policy, a penalty is derived from the sum of the economic benefit of the violation and the gravity of the violation.

68. Under the CAA Penalty Policy, U.S. EPA considers the economic benefit a violator derives from the alleged violations in determining the appropriate penalty. A violator cannot be allowed to derive monetary profit from noncompliance with the CAA, both for deterrence purposes and because other regulated entities have incurred expenses in complying with the CAA. In this case, based on information presently available, the Complainant has determined that the economic benefit to Consumers was negligible regarding Counts I and II. Hence, the proposed penalty for Counts I and II does not include an economic benefit component.

69. The Complainant calculated the seriousness or gravity of the violations by considering the potential environmental harm, the extent of deviation from the regulatory scheme, the duration of the violations and the size of the violator.

70. The Complainant for Count I considered the potential for environmental harm to be major since the violations allege improper disposal of refrigerants. Proper disposal of refrigerants is a major component of the statutory and regulatory program promulgated under Part 82 for the control of ozone depleting substances. Respondent's failure to properly recover or

obtain verification statements prior to disposal is a major deviation from the regulations contained in Part 82. In deriving the proposed penalty the Complainant considered that the violations have occurred over the past five years with the most recent violations observed on July 15, 1999. Complainant further considered that there were six separate loads of small appliances, as alleged in paragraph 30 and six separate small appliances identified on-site during EPA's July 1999 inspection as alleged in paragraph 29. Complainant treated these as twelve separate violations.

71. The Complainant for Count II considered the potential for environmental harm to be major since the violations allege improper record keeping. Record keeping is an important component of the regulations contained in Part 82. Respondent did not maintain any record of the verification statements required by Part 82. Without such records it is not possible to accurately discern the Respondent's compliance with the Part 82 requirements. Respondent's failure to properly keep records of verification statements prior to disposal is a major deviation from the regulations contained in Part 82. In deriving the proposed penalty the Complainant considered that there were at least twelve instances over the past five years where verifications statements and thus records would have been required. The Respondent did not retain records of these transactions nor did it retain records of the required verification statements. Complainant treated these as twelve separate violations.

72. Complainant is unaware of any facts which would cause it to adjust the proposed penalty for Counts I and II based on Respondent's compliance

history, previous penalties assessed for the same alleged violations or good faith efforts to comply.

73. Based upon the facts alleged in Counts I & II of this Complaint and upon the seriousness of the violations alleged, U.S. EPA hereby proposes to issue a Final Order to the Respondent assessing a penalty in the amount of \$187,000 for Counts I and II. This proposed penalty reflects a current presumption of Respondent's ability to pay the penalty and to continue in business. This proposed penalty may be adjusted if the Respondent establishes other affirmative defenses relevant to the determination of any final penalty. The proposed civil penalty has been determined in accordance with the Clean Air Act based upon the best information available to U.S. EPA at this time and in consideration of the nature, circumstances, extent and gravity of the alleged violations and the best available financial information regarding the Respondent, including information the Respondent submitted on July 5, 2000. With respect to the Respondent, other factors may mitigate calculation of a final penalty.

74. Respondent shall pay the assessed penalty by certified or cashier's check payable to "Treasurer, the United States of America", and shall deliver it, with a transmittal letter identifying the name of the case and docket number of this Complaint to:

U.S. Environmental Protection Agency, Region 5
P.O. Box 70753
Chicago, Illinois 60673

Respondent shall also include on the check the name of the case and the docket number. Respondent simultaneously shall send copies of the check and transmittal letter to:

Joseph Cardile (AE-17J)
Air and Radiation Division
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Richard Clarizio
Associate Regional Counsel
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

B. COUNT III

75. The Administrator of U.S. EPA may assess a civil penalty of up to \$10,000 per day of violation up to a total of \$125,000 for Class II violations that occurred prior to January 31, 1997, and of up to \$11,000 per day of violation up to a total of \$137,500 for Class II violations that occurred on or after January 31, 1997 according to Section 311(b) (6) (B) (ii) of the CWA, 33 U.S.C. §1321(b) (6) (B) (ii), and 40 C.F.R. Part 19.

76. Under Section 311(b) (8) of the CWA, 33 U.S.C. §1321(b) (8), the Administrator of U.S. EPA must consider the following factors when assessing an administrative penalty under Section 311(b):

- a. the seriousness of the violations;
- b. the economic benefit to the violator, if any, resulting from the violations;
- c. the degree of culpability involved;
- d. any other penalty for the same incident;
- e. any history of prior violations;
- f. the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge;

- g. the economic impact of the penalty on the violator, and
- h. any other matters as justice may require.

77. Based upon an evaluation of the facts alleged in Count III of this Complaint, and the factors listed in paragraph 76, above, Complainant, Director of the Superfund Division, proposes that the Administrator of U.S. EPA assess a civil penalty against Respondent of \$15,270 for the violations identified in Count III.

78. In determining the proposed penalty, Complainant, Director of the Superfund Division, considered the economic benefit that Respondent received from the violations. The penalty must be sufficient to prevent the violator from gaining a monetary benefit from avoiding or delaying the expenditures that are necessary to comply. Complainant, at this time, has determined that the economic benefit to Consumers was approximately \$2,870 based on Consumers failure to have an SPCC plan from at least July 1, 1996 to June 30, 2000.

79. In calculating the proposed penalty, Complainant, Director of the Superfund Division, considered the seriousness of the violations. This consideration took into account the storage capacity of Respondent's facility of 3345 gallons, its potential to impact navigable waterways and the degree to which Respondent violated the regulations at 40 C.F.R. Part 112 by not having an SPCC plan.

80. In calculating the proposed penalty, Complainant, Director of the Superfund Division, considered the degree of Respondent's culpability. This

consideration took into account Respondent's sophistication and Respondent's knowledge of the applicable regulations.

81. In calculating the proposed penalty, Complainant, Director of the Superfund Division, considered any other penalty paid by Respondent for the violations alleged in Count III of this Complaint. Complainant, Director of the Superfund Division, is not aware of any such penalty or payments.

82. In calculating the proposed penalty, Complainant, Director of the Superfund Division, considered Respondent's history of prior violations. Complainant has not increased the proposed penalty based on this factor.

83. In calculating the proposed penalty, Complainant, Director of the Superfund Division, considered the nature, extent, and degree of success of any efforts of Respondent to respond to the violations after the inspection. The penalty reflects that the Respondent did attempt to remedy the violation identified in Count III. It also reflects, however, the delays in the Respondent's response and its failure to act without further direction by the Complainant.

84. Complainant, Director of the Superfund Division, considered the economic impact of the proposed penalty on Respondent's business. Based on the best information available to Complainant at this time, including financial information submitted by the Respondent on July 5, 2000, the proposed penalty reflects a current presumption of Respondent's ability to pay the penalty and to continue in business.

85. Complainant, Director of the Superfund Division, developed the proposed penalty based on the best information available to Complainant at this time. Complainant may adjust the proposed penalty if the Respondent establishes further bonafide issues of ability to pay or other defenses relevant to the penalty's appropriateness.

86. Respondent may pay the proposed penalty presented in Count III by certified or cashier's check payable to the "Oil Spill Liability Trust Fund," by delivering the check and a copy of this Complaint to:

U.S. Coast Guard
National Pollution Fuds Center
CF-2
4200 Wilson Boulevard
Arlington, Va. 22203-1804

Beth Henning
Oil Planning and Response Section
Emergency Response Branch (SE-5J)
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77 West Jackson Boulevard
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Under Section 22.45 of the Consolidated Rules, 40 C.F.R. 22.45 you may not submit this penalty payment until 10 days after the close of the public comment period pursuant to paragraph 89. If you intend to resolve Count III of this Complaint under this paragraph, please contact Richard Clarizio to determine the penalty payment date.